Form 4 affidavit in forma pauperis

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Supreme Court, U.S.
FILED
JUN. 12 1992
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RESPONSE REQUESTED

No. 91-1503

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner

v.

THOMAS E. OTT, III,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Thomas E. Ott, III, was charged with a criminal offense in the Circuit Court for Frederick County, Maryland. He was found to meet the qualifications for representation by the Maryland State Office of the Public Defender and was represented by the Office of the Public Defender at trial and on appeal both to the Court of Special Appeals of Maryland and to the Court of Appeals of Maryland. The respondent is not incarcerated at the present time. He resides in Frederick, Maryland, which is about sixty miles away from undersigned counsel's office in Baltimore. Several weeks ago, undersigned counsel sent the respondent an affidavit for him to fill out and sign before a notary, as required by Supreme Court Rules, Rule 39, with the instruction that the respondent was to take care of this matter immediately and return the affidavit to undersigned counsel as soon as possible in the stamped envelope that was provided. To date, undersigned counsel has not received the affidavit. Undersigned counsel is still attempting to get this affidavit

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from the respondent and will file the affidavit in this Court and serve a copy of the affidavit upon the State of Maryland as soon as it arrives.

Respectfully submitted,

Victoria S. Lansburgh
Assistant Public Defender
Appellate Division
201 Saint Paul Place
Baltimore, Maryland 21202
(410) 333-4841

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this **12th** day of **June, 1992,** a copy of the Respondent's Brief in Opposition to Petition for Writ of Certiorari with its accompanying Motion for Leave to Proceed in Forma Pauperis was delivered to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Street, Baltimore, MD 21202.

Victoria S. Lansburgh

No. 91-1503

IN THE

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OCTOBER TERM, 1991

STATE OF MARYLAND,

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THOMAS E. OTT, III,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen E. Harris
Public Defender

Victoria S. Lansburgh*
Assistant Public Defender

Office of the Public Defender
Appellate Division
201 St. Paul Place
Baltimore, Maryland 21202
(410) 333-4841

Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Whether it is consistent with both *Whiteley v. Warden* and the later cases of *United States v. Leon, Maryland v. Garrison* and *Illinois v. Rodriguez* for a state court to hold that the question whether an arrest is reasonable, and hence lawful, where it was made in subjective good faith but on the basis of a police broadcast that was erroneous at the source, depends upon the degree of police negligence or misconduct, if any, at the source.

2. Whether it is consistent with both *Wong Sun v. United States* and *Rakas v. Illinois* for a state court to hold that a person may seek to exclude at his criminal trial evidence obtained by the police as a direct product of the persons's own illegal arrest, even if it should happen that the evidence was seized in a car in which the person did not necessarily have a possessory or privacy interest.

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STATEMENT OF THE CASE

Ott's arrest was made by Corporal James Fogle of the Frederick County, Maryland Sheriff's Department on the basis of a broadcast that Fogle received from that same sheriff's department that an outstanding warrant for Ott's arrest was on file in that same sheriff's department in connection with a Frederick County charge. There was no dispute below that the information as to the existence of this warrant was out-of-date at the time of the arrest because the warrant had been "satisfied" seven days earlier. At the suppression hearing, Corporal Fogle was not able to explain why the information as to the Frederick County warrant had not been

removed from his department's files, and the State of Maryland offered no other evidence to explain why the information had not been removed or why the Frederick County Sheriff's Department reasonably would require seven days or more to update its own records. There was further no dispute at the suppression hearing that at the time Fogle received the broadcast regarding the "outstanding warrant," on the strength of which Fogle arrested Ott and searched the car, Fogle had no reason to believe either that Ott or Ott's companion had committed, were in the process of committing, or were about to commit, any crime, or that the car in which Ott was sitting contained the fruits or instrumentalities of any crime. There was no dispute as well that neither Ott nor Ott's companion gave consent to search the car and that no other independent basis existed for searching the car. The search of the car followed immediately on the heels of Ott's arrest and the sole justification for the search that was given at the suppression hearing was that the search was incident to Ott's arrest and thus proper under *Chimel v. California*, 395 U.S. 752 (1969).

SUMMARY OF ARGUMENTS

I. There is no true conflict among the state and lower federal courts on the point whether the reasonableness of police conduct as a whole must be looked at in determining whether an arrest was reasonable where it was made in subjective good faith but on the basis of an erroneous police broadcast. The Court of Appeals of Maryland has determined in the instant case that the arrest was not reasonable because the State of Maryland failed to offer any proof or argument to explain why the Frederick County Sheriff's Department reasonably would require seven days or more to update its own records. The Court of Appeals of Maryland is entitled to place the burden of proof on the State to justify the reasonableness of an arrest under these circumstances.

II. There is no true conflict among the state and lower federal courts on the

point whether a person may seek to exclude at his criminal trial evidence seized by the police as a direct product of the person's own illegal arrest even though that evidence might have been seized in a place where the person did not have a possessory or privacy interest. The argument made by the State of Maryland that only one standard (whether the person has a possessory or privacy interest in the place searched) governs the question of who has "standing" to contest the seizure of evidence, no matter what the circumstances, is not supported by the cases cited by the State of Maryland for this proposition.

ARGUMENTS

I

The first issue in the petition for writ of certiorari filed by the State of Maryland in this case involves the question to what extent, in any, the legality of an arrest is affected by the fact that the arrest was based on a police dispatcher's transmission that an outstanding arrest warrant existed where the warrant was out-of-date and the information as to the existence of the warrant was erroneously retained in the police department's files. The approach taken by the Court of Appeals of Maryland to the analysis of this question is essentially consistent with the approach taken by most courts that have examined the question, consistent with the approach taken by legal scholars, and consistent with the underlying philosophy of *United States v. Leon*, 468 U.S. 897 (1984). In a nutshell, that approach is this: In considering the reasonableness of an arrest based on information transmitted by one law enforcement agent to another, one must consider the reasonableness of the police action *in toto*. Where stale information regarding the existence of an outstanding warrant is erroneously retained in police files and then passed along to an officer who makes an arrest on the strength of it, in considering whether the arrest was reasonable or not it is necessary to determine the degree of police

negligence (if any) at the source. If there appears to be no police negligence at the source, and the arrest is made in subjective good faith, the arrest (and any resulting search) will be upheld. *See Childress v. United States*, 381 A.2d 614, 617-18 and n.3 (D.C. App. 1977) (delay of four days, two of which were weekend days, in updating records was not unreasonable for a busy metropolitan police department); *Commonwealth v. Riley*, 284 Pa. Super. 280, 287-88, 425 A.2d 813, 816 (Philadelphia police, who relied on information received from the National Crime Information Center ["NCIC"] that was stale by "only four days," "were [not] responsible for the failure of the NCIC to have updated information.")[1] On the other hand, where the circumstances do indicate police (or other law enforcement) negligence at the source, the arrest will not be upheld. *See United States v. Mackey*, 387 F.Supp. 1121, 1124 (D. Nev. 1975) (where arrest was based on information received from the NCIC that was stale by five months, court found that "a computer inaccuracy *of this nature and duration*, even if unintended, amounted to a capricious disregard for the rights of the defendant as a citizen of the United States") (emphasis added.)[2]

In the instant case, the Court of Appeals of Maryland by no means foreclosed the possibility that it would ever find reasonable an arrest made in subjective good

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[1]*See* W. LaFave, 2 *Search and Seizure* §3.5(d) (2d ed. 1987) at 23, where the author observes: "Courts are perhaps understandably not inclined to infer police misconduct when the records lack currency by just a few days."

[2]As the author also observes in LaFave, *supra* at 20, n.71 (emphasis in original), it is necessary to contrast the *Mackey*-type situation, "in which there is a *false* conclusory statement, e.g., that there is an arrest warrant outstanding," with a situation such as that involved in, e.g., *United States v. Hairston*, 763 F.2d 233 (7th Cir. 1985), where "the records *are* accurate, albeit not sufficiently communicative of the underlying facts." The case of *United States v. DeLeon-Reyna*, 930 F.2d 936 (5th Cir. 1991), cited by the State of Maryland at p.15 of its petition for writ of certiorari, essentially falls into the latter category. (There, after observing a suspicious vehicle, the stopping officer transmitted the license number "WM 1438," which the dispatcher mistakenly understood as "WN1438." Certain events then occurred as a result of this mistake. Looking at the totality of the circumstances, the court held that the conduct of the stopping officer was "objectively" reasonable. The stopping officer's failure to use his unit's "code-word" policy in calling in the license plate number was held not to be such negligence as should result in a finding that the officer's subsequent conduct in investigating the vehicle further was improper.)

faith but on the strength of outdated information erroneously retained in police files. The court stated: "The determination whether it is reasonable or unreasonable for outdated information to remain in a computer must be made after consideration of the totality of the circumstances." *State v. Ott*, 325 Md. 206, 223, 600 A.2d 111, 119, n.5 (1992) (State's Appendix at 34a.) The court observed, however, that in *this* case, "The record is devoid of evidence, or, for that matter, any attempt to introduce evidence, tending to establish the amount of time it reasonably would, or should, have taken to clear the computer of executed warrants." 325 Md. at 222, 600 A.2d at 119 (State's Appendix at 32a.) Thus, the court held:

> Since the State failed to meet its burden of going forward with evidence as to the amount of time reasonably required to clear the computer of outdated information, not to mention the burden of persuasion on the issue, the trial court properly suppressed the evidence... .

325 Md. at 223, 600 A.2d at 119 (State's Appendix at 34a.)

The legal theory of the State of Maryland in this case appears to be that whenever a police officer makes an arrest in subjective good faith, the arrest and any ensuing search should always be upheld, no matter how egregious any police negligence or misconduct at the source might have been. Patently, *United States v. Leon* stands for no such proposition, *see Id.* at 923, n.4, nor do the cases of *Maryland v. Garrison*, 480 U.S. 79 (1987) or *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (neither case involving police negligence or misconduct of any sort.)[3] Without running afoul of *Leon*, *Garrison* or *Rodriguez* in any way, the Court of Appeals of Maryland has simply held that, as a matter of state law, when it is

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[3]In *Garrison*, police officers executing a proper warrant mistakenly but reasonably believed that the warrant conferred authority on them to search a place not actually covered by the warrant, and in *Rodriguez*, police officers mistakenly but reasonably believed that a person who took them into Rodriguez's apartment for the purpose of searching it had the authority to allow the search. Neither of these cases is in conflict with *Whiteley v. Warden*, 401 U.S. 560 (1971), which concerns the question of unreasonable police conduct leading to an arrest and search (i.e., information, bad at the source, passed from one police officer to another.)

conceded that an arrest was made on the strength of a warrant that was not valid at the time the arrest occurred, the State bears the burden of proving that the police *in toto* acted reasonably before the arrest and any ensuing search may be upheld. 325 Md. at 221-23, 600 A.2d at 118-19 (State's Appendix at 30a-34a.) The Court of Appeals of Maryland is entitled to make that determination for the citizens of the State of Maryland. To the extent that the opinion of the Court of Appeals of Maryland "conflicts" with any opinion of another court where the same sorts of facts were involved, it is only in the Maryland Court of Appeals's refusal to hold as a matter of law that there is some minimum amount of time that outdated information may remain in police files where lack of negligence *per se* will be found.[4] *See* 325 Md. at 221-22, 600 A.2d at 118 (State's Appendix at 30a-31a.) That provides no good reason for this Court to review the Maryland Court of Appeals's opinion in this case.

II

The State of Maryland contends here that although the arresting officer's sole basis for ordering both Ott and Ott's companion out of the car and then searching the car was Ott's arrest, Ott may not complain of the seizures that followed, even though his arrest prompted the search that led to the seizures and the search could not have been justified under any other theory. Contrary to the assertion of the State of Maryland, there are no "sharply divergent views taken" on the question whether a person in a motor vehicle has "standing" to challenge seizures that are the direct product of his own illegal arrest. (State's petition at 20.) In fact, as the Court of

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[4]The cases cited by the State of Maryland in support of its assertion that other courts have held that "the exclusionary rule should not be applied absent intentional police misconduct" (State's petition at 14-15) are all inapposite. Unlike here, none of these cases involves an arrest: (1) made entirely on the strength of a "conclusory" transmission regarding the existence of an outstanding warrant; (2) where there was no dispute that the warrant in fact was outdated at the time of the transmission; and (3) where the police department transmitting the information reasonably should have known that the warrant was outdated.

Appeals of Maryland recognized, courts around the country, federal and state alike, hold almost uniformly that the question whether an occupant of a motor vehicle has "standing" to contest a seizure of some item within that vehicle, where the claim is that the seizure was the direct product of some unlawful police action taken against him, is an entirely different question from the question whether an occupant of a motor vehicle has "standing" to contest a search of that vehicle, where the claim is that the search unlawfully took place in an area in which that person had a possessory or privacy interest. 325 Md. at 224-27, 600 A.2d at 120-21 (State's Appendix 37a-45a.) The sprinkling of cases that the State of Maryland cites for the "opposite" view are all inapposite.

The State of Maryland places most reliance upon the case of *Josephs v. Commonwealth*, 10 Va. App. 87, 390 S.E.2d 491 (1990), which, it says, is "[r]epresentative" of the view taken by courts which hold that only one standard (that of whether the person has a possessory or privacy interest in the place searched) governs the question whether the occupant of a motor vehicle has "standing" to challenge seizures of evidence inside the vehicle (State's petition at 20.) *Josephs* involved a complaint made by a passenger in a stolen vehicle that a search of that vehicle was unlawful. The Virginia court distinguished the cases relied upon by Josephs in support of her claim that she had "standing," such as *State v. Haworth*, 106 Idaho 405, 679 P.2d 1123 (1984), *State v. Eis*, 348 N.W.2d 224 (Iowa 1974) and *State v. DeMasi*, 419 A.2d 285 (R.I. 1980), vacated on other grounds, 452 U.S. 334 (1981),[5] on the basis that "[n]o stolen vehicle was involved" in those cases. 390 S.E.2d at 495. Without rejecting Josephs's general theory that a passenger in an automobile may challenge seizures that are a direct product of illegal police conduct against him, the Virginia court nevertheless declined, as a matter of policy, to apply

[5]These cases also are among those relied on by the Court of Appeals of Maryland in the instant case.

that theory to the benefit of Josephs. 390 S.E.2d at 495-97. "No valuable social purpose could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of a stolen automobile," the court said. 390 S.E.2d at 497. In each of the remaining out-of-state cases relied on by the State of Maryland (State's petition at 21-2), there was an independent basis for searching the vehicle in question (the owner or driver's consent.) Thus, whether the passenger had the right to contest any seizures that occurred on the basis that they were the direct product of illegal police action against him was essentially a non-issue in those cases.

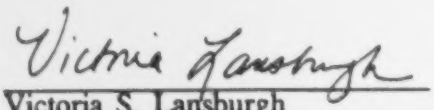
In sum, there is no true "conflict" among the courts on the question whether a person who was a passenger in a motor vehicle may sometimes and under some circumstances assert that an item of evidence recovered from that vehicle may not be used against him at his criminal trial, even though the passenger had no possessory or privacy interest in the vehicle. What the State of Maryland is seeking to have this Court do is to overrule the exclusionary rule of *Wong Sun v. United States*, 371 U.S. 471 (1963). This Court has never given any indication that *Wong Sun* is no longer good law or that some sort of "automobile exception" to the rule of *Wong Sun* exists.[6]

[6]In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court made a point of noting that the petitioners had mounted a challenge only to the search of the car, and had claimed "standing" only on the grounds that they were "legitimately on the premises" when the search took place. This Court never even hinted that if the petitioners had claimed that an unlawful interference with their persons had occurred and been able to show that the seizure of the evidence was a direct product of that interference, the petitioners would still have had to show that they had a possessory or privacy interest in the car.

CONCLUSION

The petition for writ of certiorari filed by the State of Maryland should be denied, as the State of Maryland has failed to demonstrate that review of the opinion of the Court of Appeals of Maryland is necessary or desirable.

Respectfully submitted,



Victoria S. Lansburgh
Assistant Public Defender
Appellate Division
201 St. Paul Place
Baltimore, Maryland 21202
(410) 333-4841

Counsel for Respondent